**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**Appeal from the Court of Appeals**
**Judges: Michael J. Talbot, Harold Hood, and Hilda R. Gage**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**JOHN RODNEY MCRAE**

Defendant-Appellant.
_____/

**Supreme Court No.** 121300

**Court of Appeals No.** 217052

**Lower Court No.** 98-1151-FC

**MARK E. BLUMER (P24029)**
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# BRIEF ON APPEAL – DEFENDANT-APPELLANT

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

## CONSTITUTIONS, STATUTES, COURT RULES

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Const 1963, art 6, §4, MCL 600.212, MCL 600.215(3), and MCR 7.301(A)(2) to review by appeal a case after decision by the Court of Appeals. The Judgment of Sentence in the trial court was entered on January 4, 1999. The request for the appointment of appellate counsel was filed on January 6, 1999 and the Claim of Appeal was entered on January 19, 1999. The Court of Appeals issued its opinion in this matter on February 12, 2002. This Court granted leave to appeal in this case on June 19, 2003.

## STATEMENT OF QUESTIONS PRESENTED

I. WAS MR. MCRAE DEPRIVED OF HIS STATE CONSTITUTIONAL, FIFTH, AND SIXTH AMENDMENT RIGHTS WHERE A RESERVE POLICE OFFICER INTERROGATED HIM IN JAIL WITHOUT ADVISING HIM OF HIS MIRANDA RIGHTS, WHERE HE HAD BEEN ARRAIGNED AND AN ATTORNEY HAD BEEN APPOINTED FOR HIM AT THE TIME OF THE INTERROGATION, AND WHERE ANY REQUEST TO SPEAK TO THE INDIVIDUAL INVOLVED WAS NOT A REQUEST TO TALK TO POLICE ABOUT THIS OFFENSE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

A. WAS DEAN HEINTZELMAN A STATE ACTOR AT THE TIME HE INTERROGATED MR. MCRAE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

B. DID THE STATE VIOLATE MR. MCRAE'S SIXTH AMENDMENT RIGHT TO COUNSEL BY ADMITTING AT TRIAL HEINTZELMAN'S TESTIMONY ABOUT STATEMENTS MADE AFTER DEFENSE COUNSEL WAS APPOINTED TO REPRESENT MR. MCRAE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

C. DID THE STATE VIOLATE MR. MCRAE'S FIFTH AMENDMENT AND STATE CONSTITUTIONAL RIGHTS TO BE FREE FROM COMPELLED SELF-INCRIMINATION WHERE THE INTERROGATING OFFICER FAILED TO ADVISE MR. MCRAE OF HIS MIRANDA RIGHTS?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

D. DOES THE UNITED STATES SUPREME COURT DECISION IN ILLINOIS V PERKINS COMPEL A DIFFERENT RESULT?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "No".

E. DID THE PROSECUTION MEET ITS BURDEN TO SHOW THAT MR. MCRAE WAIVED HIS CONSTITUTIONAL RIGHTS?

Court of Appeals made no answer.

Defendant-Appellant answers, "No".

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

**Procedural History:**

Trial counsel was appointed to represent Defendant-Appellant John Rodney McRae on November 13, 1997. (3a). The arraignment was held the next day. (1a). On December 17, 1997, Dean Heintzelman, Mr. McRae's former neighbor and a reserve police officer with the Clare County Sheriff's Department, went to visit Mr. McRae at the jail and Mr. McRae allegedly made incriminating statements to him. (6a). Mr. McRae sought to exclude the statements on the basis of both the Fifth Amendment and the Sixth Amendment. (8a-19a). A Walker[1] hearing was held on August 27, 1998. The trial court denied the defense motion to suppress the statements and Heintzelman testified at trial regarding these statements. (52a, 54a, 57a-68a).

On December 11, 1998, Mr. McRae was convicted of first-degree murder before Clare County Circuit Judge Kurt Hansen, following a four-day jury trial in the Gladwin County Circuit Court. On January 4, 1999, Judge Hansen imposed the mandatory sentence of nonparolable life imprisonment. (72a). Mr. McRae appealed by right. On January 12, 2001, the Court of Appeals affirmed his conviction. (77a).

Mr. McRae sought leave to appeal to this Court. On September 19, 2001, in lieu of granting leave, this Court remanded for reconsideration by the Court of Appeals on one issue and denied leave in all other respects. Specifically, this Court found that the admission into evidence of Mr. McRae's alleged statements to witness Heintzelman was not harmless and remanded for consideration of whether the admission of that evidence was error. (82a). On remand, the Court of

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[1] Referring to hearing held on the voluntariness of confessions as required by the case of People v Walker, 374 Mich 331, 338-339; 132 NW2d 87 (1965).

Appeals found no error and again affirmed Mr. McRae's conviction. (83a). Mr. McRae sought leave to appeal from that decision and this Court granted leave to appeal, directing the parties to include the following among the issues to be briefed:

"(1) whether defendant's statements to Officer Heintzelman constituted the interaction of custody and official interrogation, as discussed in *Illinois* v *Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990), and

(2) whether Officer Heintzelman was a state actor at the time defendant made the statements to him." (88a).

**Factual Background:**

Heintzelman was, at the time of his visit and at the time of court proceedings here, a reserve police officer for the Clare County Sheriff's Department. (5a, 24a-25a, 55a, 60a). He was part of the Sheriff Department personnel present at the excavation scene when the victim's body was recovered on what used to be Mr. McRae's property. (55a, 66a). His duties included transporting prisoners, assisting with jail visitation, and providing security at ball games. (60a). He and Mr. McRae were friends when they were neighbors, many years before. They associated with each other through 4-H. (26a-27a). Heintzelman's mother was also a reserve officer and her duties also included transporting jail inmates and supervising jail visitation. (25a-26a).

In December 1997, Heintzelman visited Mr. McRae at the jail. (62a-64a). Heintzelman testified that he had heard that Mr. McRae's wife, Barbara, had asked Heintzelman's mother to have Heintzelman visit Mr. McRae because he wanted to have friendly conversations with neighbors. (26a). However, neither Mr. McRae nor his wife were aware that Heintzelman was employed with the sheriff's department. (33a, 41a). Mr. McRae denied asking to see Heintzelman. Rather, his

wife had told him to expect a visit from Heintzelman and she had asked Heintzelman's mother when he would be coming. (40a).

Heintzelman was aware that Mr. McRae was being detained in a maximum security cell for first-degree murder. (27a). He wore his police uniform and his badge. (29a-30a). He was dressed in his police uniform at the time of his visit because he had just transported a prisoner. (64a). He arrived around 11:00 to 11:30 p.m., but Heintzelman claimed that Mr. McRae was not asleep. (27a-30a, 64a).

Heintzelman remained outside Mr. McRae's maximum security cell while conversing with him. He and Mr. McRae shook hands and he asked Mr. McRae about his son, Marty. (28a, 30a). He said, "Well, Marty's in here from what I understand, too." (28a). Mr. McRae then showed Heintzelman photographs of Marty, and his wife, and baby. Heintzelman then directly asked Mr. McRae, "John, did you do what you're charged with here," (28a), "did you kill Randy Laufer?" (65a). Mr. McRae did not answer. (28a, 65a, 68a). They engaged in some neighborly talk for awhile, then Heintzelman told Mr. McRae that authorities believed his son was involved in the killing: "Well, you know, they think Marty had something to do with that, you know, with Randy." (28a). Mr. McRae responded, "Well, if they try to pin it on Marty, I'll let them fry my ass." (28a, 65a). Again Heintzelman asked him, "John, did you do it?" (28a, 65a). According to Heintzelman, Mr. McRae just hung his head down and said, "Dean, it was bad. It was bad." (29a, 65a). Heintzelman then left. (65a).

Mr. McRae never refused to speak to Heintzelman because he was a police officer. Nor did he refuse to discuss the charged offense. (29a). Heintzelman never advised Mr. McRae of his Miranda rights. He felt there was no reason to do so because he had known Mr. McRae for years and they were talking as friends. (30a-31a). Yet, he reported Mr. McRae's alleged statements to

Lieutenant McClellan and volunteered to interrogate Mr. McRae further if Mr. McRae wanted to speak with him again. Mr. McRae never asked to speak with him again. (31a-32a).

Mr. McRae's cellmate,[2] Kerry Kocsis, was present during the conversation between Heintzelman and Mr. McRae. He testified that the conversation occurred at approximately midnight and that Mr. McRae was asleep when Heintzelman arrived. When Heintzelman arrived, he called Mr. McRae's name. Mr. McRae awoke and put on his glasses. He walked over to the bars to talk to Heintzelman. (34a-35a).

Kocsis was able to overhear the entire conversation, which lasted, at most, 10 minutes. (35a). Kocsis heard them discussing Mr. McRae's children and heard Heintzelman ask Mr. McRae whether he "had done it." (36a-37a). Mr. McRae either did not respond or said "No." (36a). Mr. McRae walked back to his cell and Heintzelman walked away. Heintzelman told Mr. McRae if he had anything to tell him later, he knew how to reach him. (37a).

Mr. McRae testified at the Walker hearing that Heintzelman visited him at 1:05 a.m. on a Tuesday morning. He had fallen asleep and was sound asleep when he heard someone repeatedly calling his name. He looked up and saw Heintzelman standing outside his cell. He rose, put on his glasses and put in his dentures. (41a). Heintzelman immediately asked him if he committed the charged homicide. In fact, he asked him repeatedly whether he "did it." (42a). He responded, "No, not anything at all like they're trying to make it out to be." (42a). They then discussed their families. At that time, trial counsel had already been appointed to represent Mr. McRae. Mr. McRae previously told police he did not wish to answer their questions, and wanted to remain silent. He also previously invoked his right to counsel when interrogated by police. He never told the Sheriff's Department he changed his mind. (42a-43a).

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[2] Kocsis and Mr. McRae did not share a jail cell, but were housed in the same unit. (37a-38a).

The trial judge found that Mr. McRae initiated the conversation with Heintzelman. He therefore allowed the prosecutor to introduce Mr. McRae's alleged statements. (52a). The Court of Appeals also believed that Mr. McRae initiated the conversation. (87a).

## ARGUMENT

### I. MR. MCRAE WAS DEPRIVED OF HIS STATE CONSTITUTIONAL, FIFTH, AND SIXTH AMENDMENT RIGHTS WHERE A RESERVE POLICE OFFICER INTERROGATED HIM IN JAIL WITHOUT ADVISING HIM OF HIS MIRANDA RIGHTS, WHERE HE HAD BEEN ARRAIGNED AND AN ATTORNEY HAD BEEN APPOINTED FOR HIM AT THE TIME OF THE INTERROGATION, AND WHERE ANY REQUEST TO SPEAK TO THE INDIVIDUAL INVOLVED WAS NOT A REQUEST TO TALK TO POLICE ABOUT THIS OFFENSE.

Allowing the admission of Mr. McRae's statements to Heintzelman violated Mr. McRae's Fifth Amendment, Sixth Amendment, and state Constitutional rights to counsel. Because this error implicates Mr. McRae's Constitutional rights, this Court should use a de novo standard of appellate review. Sitz v Department of State Police, 443 Mich 744; 506 NW2d 209 (1993).

The trial judge ruled that Heintzelman was not acting as a police officer, but was, rather, visiting Mr. McRae at his own request. (52a). For this reason, Judge Hansen refused to suppress the statement:

> "THE COURT: Well, the issue for the Court, as far as the Court is concerned, is why was Mr. Heintzelman back there. Was he back there as a police officer on police duties at the time, or was he back there at the request of the Defendant. He wanted to talk to him. The Defendant did. And so he's the one who initiated the conversation. And the fact that it got into culpability relative to this particular situation does not mean or does not change the fact as to what the requirements of the law are as far as what the police officer had to do.
>
> Once the conversation is initiated by the Defendant, there's no necessity to advise him of any rights concerning the Miranda rules. So absent you being able to come up with some kind of law to the contrary, the Court's going to deny the motion in this situation to

-- in limine to keep out the testimony of Mr. Heintzelman." (52a-53a).

The Court of Appeals also characterized "the relevant inquiry" as whether Heintzelman questioned Mr. McRae as a police officer on duty or whether he was there at Mr. McRae's request. (86a-87a). The Court of Appeals elaborated its position as follows:

> "Defendant advances arguments that are interesting but unsupported by the record. Defendant argues that Heintzelman's employment as a reserve sheriff's deputy placed him in the status of a police officer for purposes of his conversation with defendant despite Heintzelman's claim that he visited defendant at defendant's request and on the basis of their friendship. Although defendant asserts that Heintzelman visited defendant 'during the course of his duties as a reserve police officer,' the record establishes only that Heintzelman visited defendant after he had finished transporting a prisoner, he thought it was a good time to visit defendant, and defendant had been asking to see him. Although the nature of Heintzelman's duties as a reserve officer is pertinent to this determination. . . the record is void of any evidence regarding the specific duties the job entails other than the transportation of prisoners. The record provides no indication of whether the position comprises any investigatory responsibilities. . .
>
> Nor does the record support defendant's contention that Heintzelman used his friendship with defendant to elicit an incriminating statement or that Heintzelman was seeking information at the behest of investigating officers. On the contrary, the evidence supported the trial court's finding that Heintzelman visited defendant at defendant's request. Although the testimony differed regarding the point in the conversation at which Heintzelman inquired about defendant's involvement in the charged offense, Heintzelman, Kocsis, and defendant all testified that the conversation included talk of their families and defendant's son, thus suggesting the social aspect of the visit, as Heintzelman testified. In short, the record is void of any suggestion of the type of police coercion against which *Miranda* was intended to protect. . .
>
> Defendant relies on cases involving security guards or off-duty police officers and addressing whether they are state actors for purposes of *Miranda*. None of the cases defendant cites address

> circumstances similar to those presented here in which the statement at issue was made in the context of a conversation between former friends which, as the trial court in this case found, was initiated by the defendant. Thus, they are not helpful to the resolution of the matter before us." (87a).

For the reasons set forth below, the trial court's ruling and the Court of Appeals' decision were clearly erroneous. It strains credulity to believe that Heintzelman, a uniformed reserve deputy sheriff who was part of the law enforcement team present when Laufer's body was unearthed, did not know what he was doing when he explicitly asked Mr. McRae to admit guilt, then proceeded to inform the officer-in-charge and to testify to the admissions in court. There was also no suggestion in the record that Mr. McRae intended to initiate contact with police.

### A. DEAN HEINTZELMAN WAS A STATE ACTOR AT THE TIME HE INTERROGATED MR. MCRAE.

Dean Heintzelman admitted that he never read Mr. McRae his Miranda rights before interrogating him about the offense. He justified this failure by claiming that he visited Mr. McRae strictly in the role of a friend. (30a-31a). Yet, he wore his sheriff's department uniform and badge at the time of his visit and visited during the course of his duties as a reserve police officer. (24a-25a, 27a, 29a, 64a). As Heintzelman himself testified, there was "no mistaking" what his duties were that night, as he was wearing his uniform and badge. (29a). He reported Mr. McRae's statements to another police officer – in fact, to Lt. McClellan, who was in charge of the case against Mr. McRae at the time of the 1997 excavation. (31a, 55a). Heintzelman appeared in uniform at court proceedings. (5a). He testified at trial regarding Mr. McRae's statements. (57a-68a).

If an individual is possessed of state authority and purports to act under that authority, his action is state action. Griffin v Maryland, 378 US 130, 135; 84 S Ct 1770; 12 L Ed 2d 654 (1964); Pratt v State, 263 A2d 247, 226 (MD App 1970); Commonwealth v Leone, 435 NE2d 1036, 1040 (Mass 1982). It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law. Griffin v Maryland, 378 US at 135. The police badge does mean something.

Thus, where an amusement park security guard wore a sheriff's deputy uniform and identified himself as a deputy sheriff rather than a park employee, his actions amounted to state actions. Id., 133. Actions by a store security officer who is commissioned by the governor to act as a policeman also constitute state actions. Pratt v State, 263 A2d 247 (Md Apps 1970). Even an off-duty police officer who identifies himself as a police officer and uses his status as a police officer and its attendant power is acting as an officer. Owen v State, 490 NE2d 1130, 1137 (Ind App, 1986).[3]

On the other hand, where a store security guard is not acting in concert with the police, but is rather only furthering the interest of the store, his action does not constitute "state action." City of Grand Rapids v Impens, 414 Mich 667, 673-675; 327 NW2d 278 (1982); In the Interest of R.R., O.R. and K.R, 447 NW2d 922, 926 (SD 1989). In these cases, the security guards, although off-duty police officers, wore plainclothes and identified themselves as store employees. Impens, supra at 675-677; R.R, O.R. and K.R, 447 NW2d at 927. The image they projected clearly mattered.

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[3] In fact, "state action" has been found for the purposes of the Miranda requirement where the interrogation is conducted by a psychiatrist conducting a court-ordered examination, Estelle v Smith, 451 US 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981), and an IRS agent conducting a tax investigation. Mathis v United States, 391 US 1; 88 S Ct 1503; 20 L Ed 381 (1968).

In this case, whatever else he was, Heintzelman was a police officer. Being a reserve deputy sheriff, he was directly employed by a government body and, thus, an agent of the State.

He was also acting in his role as a police officer. He appeared at Mr. McRae's cell in the maximum security wing of the jail late at night after having escorted other inmates to the jail as part of his official duties. He was wearing his full uniform, standing outside of the bars behind which Mr. McRae was confined, when he repeatedly asked Mr. McRae whether he committed the offense. (27a-30a, 64a). Failing to receive an incriminating response, he dropped the not so subtle hint that Mr. McRae's son might be charged with the offense. In doing so, he purported to relate what authorities believed. (28a, 65a). Coming from a man whom the defendant now knew to be a police officer, a reasonable person would see such statements as a threat to turn the might of the state against a loved one. Those familiar with the criminal law would recognize it as a classic interrogation technique designed to obtain a confession – suggesting that one has no choice but to tell the "truth" in order to protect a family member from unnecessary grief. Only after Heintzelman mentioned Mr. McRae's son did he make the reported incriminating statements. (28a, 65a).

In fact, the sequence is quite telling. Mr. McRae explicitly revealed his vulnerability to this type of ploy by answering that he would "let 'em fry my ass" if police attempted to harass his son in connection with this offense. It was then that Heintzelman again pressed him for admissions. (28a, 65a). The uniformed deputy did not stop trying to elicit incrimination statements until the defendant made some, and immediately left once he had, proceeding to inform the officer in charge of the case and to testify against Mr. McRae at trial. (29a, 65a)

These were not the actions of a friend. This is not a case where a suspect simply confided incriminating information to a friend, without solicitation. Nor is it likely that a mere friend could possibly have played such a role without being a state actor.

He had just transported another inmate to the jail. As Griffin, supra, et. al. make clear, it is not the niceties of whether he was technically on duty or off-duty at the time of the interrogation that resolves the issue. By virtue of his status as an officer, he was able to gain access to Mr. McRae at a time and place not permitted of the general public. If Heintzelman had indeed been visiting strictly as a friend, and not an interrogating police officer, he would not have initiated his visit at a time when most people, incarcerated or not, are either asleep or getting ready to go to sleep. Likewise, he would not have repeatedly badgered Mr. McRae about whether he committed the offense. Nor would the implied threats against the defendant's son and the insistent requests for admissions have had the same impact coming from someone without a police uniform – whatever other role Heintzelman played, or thought he played, it was the uniformed officer that conveyed to the confined Mr. McRae the sense of control over his fate that marks custodial interrogation. See Illinois v Perkins, 496 US 292, 297; 110 S Ct 2394; 110 L Ed 2d 243 (1990).

The judge found Heintzelman did not act as a police officer because Mr. McRae asked to see him, and the Court of Appeals accepted this conclusion. While the question of who initiated the interrogation is relevant to whether Mr. McRae waived his constitutional rights, it has no bearing on whether Heintzelman was a state actor. In short, even where a defendant knowingly and intelligently waives his rights and asks to speak to police about his offense, this does not somehow imply that they have become civilians and are no longer working for the state.

Nor is it necessary, as implied by the Court of Appeals, that the record show Heintzelman to have investigatory responsibilities. He was a member of the same department investigating the case – the Clare County Sheriff's Department. Under the prophylactic rules imposed by the United States Supreme Court, the responsibility for "scrupulously honoring" defendants' rights falls on the shoulders of police. Michigan v Mosley, 423 US 96, 103-104; 96 S Ct 321; 46 L Ed 2d 313 (1975).

The State's knowledge of the facts of any given case is imputed from one state actor to another. Michigan v Jackson, 475 US at 634; Arizona v Roberson, 486 US 675; 108 S Ct 2093; 100 L Ed 2d 704 (1988). One would think that a measure of responsibility falls on individual police officers – particularly those in regular contact with prisoners and who have responsibilities for security outside of the prison context – for knowing the constitutional limitations on interrogating suspects. The onus for training those individual officers would also fall to the state. Even if his status as a state actor were not clear from his use of his position and his apparent authority as an officer, he would still be a state actor by virtue of his status as a reserve deputy.

If Heintzelman ceases to be a state actor simply because he is not officially designated as part of the investigative team, then any other officer whose duties include the transportation of prisoners and supervision of visits could routinely circumvent an inmate's constitutional rights. All an arresting officer would have to do is pass off transportation responsibilities to an officer who will participate no further in the case, with the tacit understanding at worst, and with a clear incentive at best, for that transportation officer to interrogate the inmate without having to heed the bothersome requirements of the United States Constitution. It should be no surprise that reserve deputy sheriffs, who routinely transport prisoners and supervise visits, are expected to know that they cannot simply start interrogating suspects without restraint simply because they are not assigned to investigate the case.

The Court of Appeals' suggestion that Heintzelman's reference to Mr. McRae's son indicates they were merely having a friendly conversation is particularly naïve in light of the jurisprudence. Establishing common ground would seem a well-recognized aspect of interrogation, as building trust is an essential part of softening up a suspect before attempting to extract key information. Capitalizing on Mr. McRae's paternal instinct to protect his son, even at his own

expense, was just the kind of tactic that he should have been protected against by invoking his right to counsel. The incorrect assumption is that Heintzelman could only act as a police officer or as a friend. In this case, he wore a uniform and had a connection to Mr. McRae as a former friend and neighbor, and he used them both. Nor is it necessary, as implied by the Court of Appeals, that the tactics involved rise to the level of compulsion against which Miranda was designed to protect. (87a). The tactics themselves are an indication of Heintzelman's status.[4]

When one wears a police uniform, one's actions reflect on the state. Wearing that uniform can be an honor, but it also carries responsibilities. It – and they – should not be treated lightly. Dean Heintzelman was a police officer. He projected the image of the police officer, even if he also (as in most interrogations) tried to project the image that he was the defendant's friend, and on his side. He acted consistently with his role as an officer from start to finish. It would take Herculean efforts to portray him as anything else.

### B. THE STATE VIOLATED MR. MCRAE'S SIXTH AMENDMENT RIGHT TO COUNSEL BY ADMITTING AT TRIAL HEINTZELMAN'S TESTIMONY ABOUT STATEMENTS MADE AFTER DEFENSE COUNSEL WAS APPOINTED TO REPRESENT MR. MCRAE.

The Sixth Amendment to the United States Constitution and the Michigan Constitution entitle the accused in all criminal prosecutions to "the assistance of counsel for his defense." US Const, Am VI; Const 1963, art 1, § 20. The purpose of the Sixth Amendment counsel guarantee is to protect the unaided layman at critical confrontations with his expert adversary – the government –

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[4] And, though the Court of Appeals acknowledged that it was undisputed that Mr. McRae's Sixth Amendment right to counsel had attached, (86a), it failed to acknowledge that a lack of coercion does not end the inquiry in the Sixth Amendment context. See Issues I B., I E., infra.

after the adverse positions of government and defendant have solidified with respect to the particular alleged crime. McNeil v Wisconsin, 501 US 171, 177-178; 111 S Ct 2204; 115 L Ed 2d 158, 168 (1991). Consequently, the Sixth Amendment guarantee of the assistance of counsel provides the right to counsel at post-arraignment interrogations. Michigan v Jackson, 475 US 625, 629; 106 S Ct 1404; 89 L Ed 2d 631 (1986). The arraignment signals "the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment. Id. The Jackson Court emphasized that the Sixth Amendment guarantees the accused, after the initiation of formal charges, "the right to rely on counsel as a 'medium' between him and the State." Michigan v Jackson, 475 US at 632.

The assertion of the right to counsel is a significant event and additional safeguards are necessary when the accused asks for counsel. Michigan v Jackson, 475 US at 636. Once a defendant has been formally charged, the Sixth Amendment guarantees prohibit subsequent police-initiated postarraignment interrogations on the charges. People v Crusoe, 433 Mich 666, 669; 499 NW2d 641 (1989). Therefore, if police initiate questioning after a defendant's assertion of his right to counsel, at an arraignment or similar proceedings, any waiver of the defendant's right to counsel is invalid. Id.

In this case, there is no question that the alleged statements were made to a reserve sheriff's deputy after Mr. McRae had been arraigned and after counsel had been appointed to represent him. (86a). When Heintzelman visited Mr. McRae in December 1997, Mr. McRae had already been arraigned and had counsel appointed. (1a, 3a, 6a). Since Heintzelman initiated the interrogation by asking Mr. McRae to admit guilt, and continued to press him after his initial refusal to do so, his actions constitute a clear violation of the Sixth Amendment.

## C. WHERE THE INTERROGATING OFFICER FAILED TO ADVISE MR. MCRAE OF HIS MIRANDA RIGHTS, THE STATE VIOLATED MR. MCRAE'S FIFTH AMENDMENT AND STATE CONSTITUTIONAL RIGHTS TO BE FREE FROM COMPELLED SELF-INCRIMINATION.

Heintzelman's failure to advise Mr. McRae of his Miranda rights before extracting his statement prohibited the admission of that statement at trial. Michigan citizens may not be compelled to be witnesses against themselves. US Const, Am V; Const 1963, art 1, § 17. To protect the privilege against self-incrimination in the "inherently compelling" atmosphere of custodial interrogation, the United States Supreme Court fashioned a set of procedural safeguards. Miranda v Arizona, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). The Miranda Court adopted the following, now familiar procedure:

> "[The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Miranda, supra at 479.

Although a suspect may waive these rights after receiving the warnings, "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of the interrogation can be used against him." Id.

In this case, it is undisputed that Heintzelman did not read the requisite Miranda warnings to Mr. McRae. (30a-31a). He nevertheless used techniques of interrogation to elicit incriminating responses while Mr. McRae was in jail, in the custody of the state. (28a). Mr. McRae had

previously invoked his Miranda rights. (43a). Consequently, Mr. McRae's alleged statements, extracted in violation of Miranda v Arizona, supra, were inadmissible at trial.

## D. THE UNITED STATES SUPREME COURT DECISION IN ILLINOIS V PERKINS DOES NOT COMPEL A DIFFERENT RESULT.

In Illinois v Perkins, 496 US 292, 294; 110 S Ct 2394; 110 L Ed 2d 243 (1990), the United States Supreme Court held that Miranda warnings were not required when an undercover police agent, masquerading as a fellow inmate, was placed into the defendant's cell to elicit information about offenses unrelated to that for which the defendant was incarcerated.[5] Perkins predicated its holding on the notion that Miranda was to be strictly enforced, but only where the concerns that motivated the Miranda decision were implicated. Id., 296. Thus, since "[c]onversations between suspects and undercover agents do not implicate the concerns underlying Miranda," it held that Miranda warnings were not required.

In describing the harms which motivated Miranda, the court expressed concern with not only those situations in which a suspect "will feel compelled to speak by the fear of reprisal," but also with those in which he is motivated by "the hope of more lenient treatment should he confess." Id., 297. The court further explained its holding by noting that "[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect **does not know** that he is conversing with a government agent, these pressures do not exist." Id (emphasis added).

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[5] As no charges had been filed on the subject of the interrogation by the undercover agent, the Sixth Amendment did not apply. Perkins, 299.

Strictly speaking, Perkins does not control here, because it dealt exclusively with an **initial** failure to read the defendant his rights. It did not deal with a situation, as is present here, in which the accused had already asserted his constitutional rights. Such a situation requires the state to show a valid waiver of constitutional rights. Perkins, 300 (Brennan, J., concurring); Edwards v Arizona, supra. See also Issue I.E., infra. While Miranda is concerned with preventing **coercion**, a valid waiver cannot be the product of intimidation, coercion **or deception**. Arizona v Roberson, 486 US 675; 108 S Ct 2093; 100 L Ed 2d 704 (1988). Thus, the agent's deception in Perkins did not play a role in the court's holding, but the interrogation techniques employed by Heintzelman would be relevant, even if they were seen as deceptive rather than rising to the level of compulsion. Factually, as well, Perkins does not condone the conduct here, as it simply excuses the failure to read Miranda warnings in a distinct situation: that of police posing as inmates and asking questions about an offense other than the one for which the defendant is incarcerated.

The logic of Perkins, does, however, counsel reversal here. The holding in that case was inextricably tied to the facts before it: undercover agents whom the defendant **did not know** were actually police. Where the accused clearly knows he is talking to a police officer, as here, the subtle pressures described by Miranda and Perkins as inherent in custodial interrogation come into play.

The custodial interrogation here was not merely a technicality. John McRae was standing behind bars in the maximum security section of the jail. The man repeatedly asking him to incriminate himself, friend or no friend, was wearing a police uniform, having just delivered another inmate to the jail. Whatever other role Heintzelman could have played, the same fears of reprisal and hopes of lenient treatment attended his persistent questioning. By his appearance, by his actions, and by his presence at a time and place one would not expect a member of the general public to be, Heintzelman was reasonably associated with police and seen as one with control over

Mr. McRae's fate. Using the possibility of police action against Mr. McRae's son as a setup for a renewed request for a confession made Heintzelman's tactics not merely deceptive, but coercive. The scenario that played out in the Clare County Jail was classic interrogation by a police officer, with the expected results on someone who had made it clear he did not feel comfortable being questioned about this offense without counsel as an intermediary.

## E. THE PROSECUTION DID NOT, AND CANNOT, MEET ITS BURDEN TO SHOW THAT MR. MCRAE WAIVED HIS CONSTITUTIONAL RIGHTS.

Even if this Court were to hold that Perkins somehow exempted police from giving Miranda warnings here, reversal is still required absent a valid waiver of Mr. McRae's Sixth Amendment rights. Since Heintzelman was a state actor, and since Mr. McRae had invoked both his Fifth and Sixth Amendment rights prior to Heintzelman's questioning, reversal is required unless Mr. McRae validly waived his constitutional rights.

The trial judge refused to suppress the statements because he found that Mr. McRae initiated the contact with Heintzelman, and the Court of Appeals adopted this view. (86a-87a). In fact, Mr. McRae himself did not initiate the contact. Rather, it was his wife who asked Heintzelman's mother to have Heintzelman visit him. (26a). Even if his wife's actions could be attributed to him, these actions cannot be considered a waiver of Mr. McRae's Sixth Amendment right to counsel. The relevant inquiry is not, as framed by the trial court and Court of Appeals, who initiates the **conversation**. What is dispositive is who initiates the **interrogation** – discussion about the alleged offense. Oregon v Bradshaw, 462 US 1039, 1045, 1053; 103 S Ct 2830; 77 L Ed 2d 405 (1983). See also McNeil v Wisconsin, 501 US 171, 179; 111 S Ct 2204; 115 L Ed 2d 158, 168 (1991); Michigan v Jackson, 475 US 625, 636; 106 S Ct 1404; 89 L Ed 2d 631 (1986). Edwards v Arizona,

451 US 477, 486; 101 S Ct 1880; 68 L Ed 2d 378 (1981); People v Kowalski, 230 Mich App 464, 478; 584 NW2d 613 (1998). It would be absurd to hold that a defendant who asserts his rights but later asks a deputy for a cigarette, or who simply says hello to him, has suddenly opened the door to all manner of interrogation. Bradshaw, 1045, 1053.

The exclusive focus on who initiates the conversation leads the analysis astray because it seizes on language in Edwards v Arizona without regard for the relevant context. Edwards held that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards, 485. Five years later, the Supreme Court extended Edwards to the Sixth Amendment context. Michigan v Jackson, 636. The dispositive question, however, is not who starts talking first. The dispositive questions are whether the defendant expressed a desire to talk about his offense and whether made a knowing, intelligent, and voluntary waiver of his constitutional rights. Bradshaw, 1045, 1053; Edwards, 485. However, courts are to indulge in every reasonable presumption against waiver, thus it is the prosecution's burden to show that constitutional rights have been properly waived. Michigan v Jackson, 475 US at 633; Johnson v Zerbst, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938); Miranda, 384 US at 479.[6] A valid waiver can only be shown if the defendant initiates "further communication, exchanges, or conversations with the police" about the offense and also knowingly, intelligently, and voluntarily waives his rights. The absence of either compels suppression of the statements in question.

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[6] Moreover, as the Jackson court noted, "doubts must be resolved in favor of protecting the constitutional claim." Jackson, 633. Any waiver of counsel after the assertion of the Sixth Amendment right is specifically presumed to be invalid. Jackson, 636.

Even assuming that Mr. McRae explicitly asked to see Heintzelman, the record contains no indication that he knew that Heintzelman was a police officer at that time. In fact, the record reveals the contrary to be true. The testimony is unrefuted that neither Mr. McRae nor his wife knew that Heintzelman was a police officer when she made the request. (33a, 41a). Mr. McRae's wife wanted Heintzelman to visit Mr. McRae because he was Mr. McRae's friend and former neighbor. She intended to initiate a supportive, friendly visit by a neighbor and friend. She did not intend to initiate a police interrogation. Heintzelman himself testified that he visited because he heard that Mr. McRae wanted to talk to him as an old friend – not that Mr. McRae wanted to discuss his case. (26a-27a). The Court of Appeals similarly relied on this view of events, noting Heintzelman's belief not that Mr. McRae intended to waive his rights and speak to police, but that Mr. McRae "just [ ] wanted company." (84a). Thus, all of the evidence indicates that the purpose of the request was not to initiate contact with police. The record simply does not support a finding that Mr. McRae intended to initiate a police interrogation.

John McRae had invoked his right to remain silent and requested an attorney when previously interrogated by police. Had he intended to subject himself to custodial police questioning, he obviously would have contacted the police officers who interrogated him earlier. A defendant's request for a visit from a friend does not constitute initiation of a police interrogation simply because that friend turns out to be a police officer.[7]

The inescapable conclusion is that John McRae could not make a knowing waiver of his rights (most pointedly, his Sixth Amendment right to have counsel as a medium between him and

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[7] Such a rule would also set a dangerous precedent. If such is the case, then all friends and relatives of police officials are vulnerable.

the state)[8] by asking to see Heintzelman without knowing that he was a police officer. Since there is nothing on the record to refute the testimony that he was unaware of Heintzelman's status as a reserve deputy, the state cannot overcome the presumption against waiver. Any trial court conclusion to the contrary is clearly erroneous.

The record is also completely devoid of any suggestion that Mr. McRae initiated any conversation at all after Heintzelman appeared at his jail cell in uniform, much less any conversation about the offense. To the contrary, there was some talk about family, after which Heintzelman began asking Mr. McRae if he was guilty of the offenses charged here. (22a, 28a). Once the Sixth Amendment right to counsel is invoked, a subsequent waiver is presumed invalid. Jackson, 475 US at 636. Moreover, once the right to counsel has been invoked, a valid waiver "cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation. . . ." Edwards, 484; Kowalski, 491 (Corrigan, CJ, concurring).[9] The record is clear that it was Heintzelman who initiated a conversation about the offense, and there is no record support for the proposition that Mr. McRae initiated contact with police or properly waived his rights before that questioning began.

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8 It would be particularly inappropriate to find a knowing waiver of the Sixth Amendment right to counsel, as the purpose of invoking that right is to "'protect the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of the government and the defendant have solidified' with respect to the particular alleged crime." McNeil v Wisconsin, 501 US at 177-178. When a friend, who, unbeknownst to the defendant, turns out to be a police officer, appears at his cell and begins innocuously enough, but proceeds to interrogate the accused by asking for admissions and raising the possibility of harm to his son if he does not cooperate, the defendant is put in exactly the kind of duel with his "expert adversary" that he attempted to avoid – and at any rate has the right to avoid – by asserting his right to counsel.

9 If anything, Illinois v Perkins gives greater insight into why this would be so. Key to Perkins' holding was that the defendant there did not know the state agent was a police officer at the time he was questioned, so there was no sense of compulsion by knowing that one is dealing with one who appears to have some degree of control over his fate. Perkins, 297. This was pointedly not the case here.

Heintzelman's interrogation violated Mr. McRae's constitutional rights. No amount of clever argument can disguise or dress up what Heintzelman did. By pushing Mr. McRae to admit guilt, purporting to relate what authorities believed about his son and again seeking a confession, reporting the conversation to his superior officer, and testifying against Mr. McRae in court, Heintzelman was not acting as a friend. Rather, he was most decidedly placing Mr. McRae into a "critical confrontation[] with his adversary." Michigan v Jackson, 630 (quoting United States v Gouveia, 467 US 180, 189; 104 S Ct 2292; 81 L Ed 2d 146 (1984)). The statements extracted during that interrogation were elicited at his instigation and were inadmissible at trial. Since this Court has already found the admission, if erroneous, to be prejudicial, this Court must remand for a new trial. (82a).

## SUMMARY AND RELIEF

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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